

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 6, 2020, as he no longer had disability or residuals causally related to his accepted January 26, 2011 employment injury; and (2) whether appellant has met his burden of proof to establish continuing disability or residuals on or after August 6, 2020, causally related to his accepted January 26, 2011 employment injury.

FACTUAL HISTORY

On February 1, 2011 appellant, then a 57-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on January 26, 2010³ he injured the left side of his neck, right hip, and right leg while in the performance of duty.⁴ He explained that, when doing yard inventory on January 26, 2011, he slipped on ice and hit his left shoulder and right leg while in the performance of duty. Appellant stopped work on February 3, 2011. OWCP accepted his claim for temporary aggravation of preexisting right knee osteoarthritis, temporary aggravation of preexisting right hip osteoarthritis, lumbago, neck strain, and left shoulder contusion. It paid appellant wage-loss compensation on the supplemental rolls beginning March 21, 2011 and placed him on the periodic rolls, effective October 23, 2011.

On May 22, 2012 appellant underwent right knee arthroscopic surgery.

On October 2, 2019 OWCP referred appellant, along with a statement of accepted facts, a copy of the case record, and a series of questions, to Dr. Steven J. Valentino, an osteopath specializing in orthopedic surgery, for a second opinion evaluation regarding the status of his employment-related injuries.

In an October 22, 2019 report, Dr. Valentino reviewed the history of injury and noted appellant's current complaints of low back, right knee, right hip, and left shoulder pain. Upon examination of the lumbar spine, he observed normal spinal curves and no spasm, trigger points, or subluxation. Examination of appellant's cervical spine revealed full range of motion (ROM). Upon examination of the right knee, Dr. Valentino observed no synovitis or effusion and negative anterior and posterior drawer sign, varus and valgus stress testing, and Lachman's and McMurray signs. He opined that appellant's work-related injuries had resolved and that he could return to work.

In a letter dated November 21, 2019, OWCP requested that Dr. Valentino provide a supplemental report clarifying how his specific examination findings supported his opinion that appellant's work-related injuries had resolved.

³ The Board notes that the Form CA-1 reports a date of injury of January 26, 2010, which appears to be a typographical error, as the evidence of record consistently refers to a date of injury of January 26, 2011.

⁴ The record reflects that appellant had a previously accepted traumatic injury claim under OWCP File No. xxxxxx570 for a right shoulder strain, right shoulder cuff tendinitis, and right shoulder impingement syndrome. Appellant also has an accepted traumatic injury claim under OWCP File No. xxxxxx783 for a left shoulder sprain. The cases have not been administratively combined by OWCP.

In a December 2, 2019 addendum report, Dr. Valentino explained that appellant's temporary aggravation of right knee osteoarthritis had resolved based on physical examination findings that revealed physiologic ROM without synovitis or effusion and the absence of any internal derangement. He also reported that appellant's temporary aggravation of right hip osteoarthritis had resolved, given appellant's full ROM and negative FABER tests. Dr. Valentino indicated that appellant's left shoulder condition had resolved and noted examination findings of normal ROM and negative provocative testing about the shoulder. He concluded that appellant's cervical strain and lumbago had resolved, given the normal ROM and absence of spasm or any positive tension signs.

In a notice dated December 10, 2019, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because he no longer had disability or residuals causally related to his accepted January 26, 2011 employment injury. It found that the weight of the medical evidence rested with Dr. Valentino who found that appellant no longer had any disability or residuals causally related to his accepted employment injury. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.

In a January 2, 2020 report, Dr. Richard J. Zamarin, a Board-certified orthopedic surgeon, indicated that he evaluated appellant for complaints of low back, neck, bilateral shoulder, right knee, and right hip pain. He described the January 26, 2011 work injury and reviewed appellant's medical records. Upon examination of appellant's cervical spine, Dr. Zamarin observed tenderness over the left trapezius muscle and negative Spurling's test bilaterally with right-sided neck pain. Examination of appellant's lumbar spine revealed tenderness over the bilateral sacroiliac (SI) joints and right paraspinal area. Dr. Zamarin reported that examination of appellant's left shoulder demonstrated tenderness over the lateral and anterior subacromial space and decreased sensation. Upon examination of appellant's right hip, he observed tenderness over the right greater trochanter and tenderness of the lateral calf. Dr. Zamarin reported that appellant's accepted cervical sprain, lumbar sprain, left shoulder contusion, and right hip conditions had resolved. He also indicated that appellant sustained a permanent aggravation of his preexisting right knee osteoarthritis condition and continued to suffer residuals of this condition. Dr. Zamarin explained that the January 26, 2011 injury and subsequent treatment, including surgery, accelerated the degenerative process in appellant's right knee. He opined that appellant was not capable of returning to his date-of-injury job and noted that appellant's disability was partly a result of the aggravation of severe right knee degenerative joint disease.

In progress notes dated January 8 and February 5, 2020, Dr. Dong H. Ko, a Board-certified physiatrist and pain medicine specialist, recounted appellant's complaints of low back pain. Upon examination of appellant's lumbar spine, he observed tenderness upon palpation bilaterally, limited ROM, and decreased lumbar lordosis. Dr. Ko diagnosed lumbosacral spondylosis without myelopathy or radiculopathy and unspecified osteoarthritis of the hip and knee.

OWCP determined that a conflict in medical evidence existed between appellant's treating physician, Dr. Zamarin, and OWCP second-opinion examiner, Dr. Valentino. It referred appellant to Dr. John F. Perry, a Board-certified orthopedic surgeon, to serve as an impartial medical examiner (IME) to resolve the conflict.

In a March 10, 2020 report, Dr. Perry indicated that he reviewed appellant's records, including diagnostic tests, and noted that his claim was accepted for temporary aggravation of right knee and right hip osteoarthritis, left shoulder contusion, cervical strain, and lumbago. He indicated that appellant's number one complaint was right knee pain radiating to the right ankle. Upon examination of appellant's cervical spine, Dr. Perry observed no paravertebral or trapezius tenderness. Examination of the lumbar spine demonstrated flexion to 90 degrees and extension to 15 degrees. Upon examination of the right knee, Dr. Perry observed tenderness along the right knee medial and lateral joint lines and minimal crepitus. He diagnosed twisting injury with cervical spine, lumbar spine, right knee, and left shoulder sprains and strains no evidence of a work-related condition by objective criteria that would produce ongoing functional impairment or disability, and likely opioid dependency.

Dr. Perry reported that imaging studies of appellant's right knee, low back, right hip, and neck revealed degeneration and osteoarthritis changes and did not show a trauma induced musculoskeletal condition that would produce long-term disability. He explained that the imaging studies of the cervical and lumbar spine areas of appellant's spine did not support his symptoms of difficulty walking and maneuvering. Dr. Perry opined that, regarding appellant's January 26, 2011 work injury, appellant could return to work without restrictions. He indicated that appellant "may have had" exacerbations of his preexisting arthritis in the neck, low back, right hip, and right knee, but those were "back to baseline," based on objective criteria. Dr. Perry reported that, based on appellant's preexisting arthritic conditions, appellant could return to full-time, light-duty work. He explained that these work restrictions were not based on appellant's work-related injuries.

Appellant submitted additional evidence. In an April 22, 2020 progress note, Dr. Jian Chen, a Board-certified preventive pain, and internal medicine specialist, noted appellant's complaints of severe pain in his right leg. He diagnosed lumbosacral radiculopathy.

In progress notes dated May 21 and June 25, 2020, Dr. Yasin N. Khan, a Board-certified anesthesiologist, noted appellant's complaints of chronic low back and right leg pain. He reported lumbar examination findings of decreased lumbar lordosis, limited ROM, and tenderness bilaterally. Dr. Khan diagnosed lumbosacral spondylosis without myelopathy or radiculopathy, and lumbar radiculopathy.

In a June 5, 2020 progress note, Dr. Akintomi Olugbodi, a Board-certified pain and internal medicine specialist, reported lumbar examination findings of tenderness over the lumbar facets with positive facet loading bilaterally. He diagnosed lumbosacral spondylosis without myelopathy and unspecified osteoarthritis of the hip and knee.

By decision dated August 6, 2020, OWCP finalized the notice of proposed termination of appellant's wage-loss compensation and medical benefits, effective that day. It found that the special weight of medical evidence rested with Dr. Perry, the IME, who indicated, in a March 10, 2020 report, that appellant no longer had disability or residuals due to his January 26, 2011 employment injury.

On August 12, 2020 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant submitted additional evidence. In a July 29, 2020 progress report, Dr. Chen recounted appellant's complaints of low back pain and diagnosed lumbosacral spondylosis without myelopathy or radiculopathy.

In a September 26, 2020 report, Dr. Lisa Marie Sheppard, a Board-certified diagnostic radiologist, indicated that x-ray evaluations performed on August 18, 2020 revealed a right hip joint space measuring .9 millimeter (mm). She noted that x-ray evaluation of appellant's right knee demonstrated medial joint space measuring 1.7 mm and lateral joint space measuring 1.9 mm. Dr. Sheppard indicated that x-ray evaluation of appellant's right ankle and foot revealed tibiotalar joint space measuring 1.4 mm, talocalcaneal joint space measuring 2.0 mm, talonavicular joint space measuring 1.3 mm, and calcaneocuboid joint space measuring 1.7 mm.

In a November 11, 2020 letter, appellant, through counsel, requested a written review of the record in lieu of an oral hearing.

By decision dated January 4, 2021, OWCP's hearing representative affirmed the August 6, 2020 termination decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of benefits.⁵ It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁸ To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition, which require further medical treatment.⁹

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.¹⁰

⁵ *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see also I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁸ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁹ *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

¹⁰ 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹¹ When OWCP has referred the case to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 6, 2020.

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Zamarin, appellant's treating physician, and Dr. Valentino, an OWCP second opinion examiner, regarding the status of appellant's January 26, 2011 employment injury and referred appellant, pursuant to 5 U.S.C. § 8123(a), to Dr. Perry for an impartial medical examination and an opinion as to whether appellant had disability or residuals causally related to his January 26, 2011 employment injury.

In a March 10, 2020 report, Dr. Perry reviewed appellant's history of injury and noted that his claim was accepted for temporary aggravation of right knee and right hip osteoarthritis, left shoulder contusion, cervical strain, and lumbago. He provided examination findings and indicated that imaging studies of appellant's right knee, low back, right hip, and left side of the neck revealed degeneration and osteoarthritis changes. Dr. Perry explained that none of the imaging studies showed a trauma-induced musculoskeletal condition that would produce long-term disability. He opined that appellant did not have any work restrictions causally related to his January 26, 2011 work injury and noted that any work restrictions were a result of appellant's preexisting degenerative conditions. Dr. Perry reported that appellant "may have had" exacerbations of his preexisting arthritis in the neck, low back, right hip, and right knee, but those were "back to baseline," based on objective criteria.

The Board finds that Dr. Perry's report did not contain sufficient medical reasoning to establish that appellant no longer had disability or residuals due to his January 26, 2011 employment injury.¹³ While he opined that appellant had no disability causally related to his accepted conditions, Dr. Perry did not specifically explain, with medical rationale, whether all of appellant's work-related injuries had resolved. He concluded that the preexisting arthritis in appellant's neck, low back, right hip, and right knee were "back to baseline." However, Dr. Perry did not explain whether or how this conclusion was supported by objective evidence.¹⁴ Rationalized medical evidence must include rationale explaining how the physician reached the

¹¹ *H.B.*, Docket No. 19-0926 (issued September 10, 2020); *C.H.*, Docket No. 18-1065 (issued November 29, 2018); *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹² *S.S.*, Docket No. 19-0766 (issued December 13, 2019); *W.M.*, Docket No. 18-0957 (issued October 15, 2018); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹³ *See C.G.*, Docket No. 20-0808 (issued April 23, 2021); *J.W.*, Docket No. 19-1014 (issued October 24, 2019).

¹⁴ *See A.G.*, Docket No. 21-0315 (issued December 29, 2021).

conclusion he or she is supporting.¹⁵ His opinion that appellant could return to modified work due to nonwork-related conditions, is therefore of diminished probative value and insufficient to justify the termination of appellant's wage-loss compensation and medical benefits.¹⁶ The Board thus finds that OWCP did not meet its burden of proof.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 6, 2020.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 19, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁵ *B.B.*, Docket No. 19-1102 (issued November 7, 2019); *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁶ *S.R.*, Docket No. 19-1229 (issued May 15, 2020); *B.M.*, Docket No. 21-0101 (issued December 15, 2021); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008).

¹⁷ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.